SERVED: April 6, 1992

NTSB Order No. EA-3523

# UNITED STATES OF AMERICA NATIONAL TRANSPORTATION SAFETY BOARD WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD at its office in Washington, D. C. on the 19th day of March, 1992

BARRY LAMBERT HARRIS, Acting Administrator, Federal Aviation Administration,

Complainant,

Docket SE-8748

v.

JOHN F. BOARDMAN ,

Respondent.

## OPINION AND ORDER

Respondent has appealed from the initial decision

Administrative Law Judge Thomas W. Reilly issued from the

bench at the conclusion of an evidentiary hearing held June

28, 1988, in Anchorage, Alaska.¹ The law judge affirmed in

its entirety an order (complaint) of the Administrator that

was issued June 28, 1988. By that order, the Administrator

suspended respondent's airline transport pilot (ATP)

certificate for 25 days for using a right-hand pattern in an

 $<sup>\,^{\</sup>scriptscriptstyle 1}\! A$  copy of the initial decision, an excerpt from the transcript, is attached.

approach to Ralph Wien Memorial Airport, Kotzebue, Alaska, allegedly in violation of Section 91.89(a) of the Federal Aviation Regulations (FAR).<sup>2</sup>

The complaint cited a November 20, 1986, passenger-carrying flight in air transportation, Alaska Airlines Flight #51, conducted under FAR Part 121 in a Boeing 737-200 aircraft. Respondent admitted he was pilot-in-command of the flight. Respondent's answer to the complaint admitted all of the factual allegations, including the allegation that his approach turn was made to the right. He denied any wrongdoing, however. We deny the appeal and affirm the law judge's decision.

We first address respondent's motions to consider further evidence and for oral argument, made subsequent to the filing of his brief on appeal. The Board's Rules of Practice (49 CFR Part 821) do not authorize petitions seeking the taking of new evidence until after the Board has ruled on the appeal to the initial decision. <u>See</u> 49 C.F.R. 821.50, which provides for petitions for rehearing, reconsideration,

<sup>&</sup>lt;sup>2</sup>FAR section 91.89(a), as pertinent, reads:

<sup>&</sup>quot;§ 91.89 Operation at airports without control towers.

<sup>(</sup>a) Each person operating an aircraft to or from an airport without an operating control tower shall--

<sup>(1)</sup> In the case of an airplane approaching to land, make all turns of that airplane to the left unless the airport displays approved light signals or visual markings indicating that turns should be made to the right, in which case the pilot shall make all turns to the right;"

etc. of decisions by the <u>Board</u>, not its law judges. <u>See</u>, <u>e.g.</u>, <u>Administrator v. Richards</u>, 3 NTSB 2098, 2099 (1979).

In any event, even if we were to consider the proffered material as new evidence, and review it on its merits, it would not warrant a different result.

The critical document is a memorandum from an Alaska Region FAA employee reporting on an FAA/industry meeting regarding FAR 91.89(a)(l). The memo states that the current rule is too "restrictive," and recommends changes to allow for right hand turns in certain circumstances.

Initially, it is important to note that the memo itself is presented as "the rationale behind their [the industry's] proposal," not as the writer's opinion. More importantly, however, even were the memo treated as the writer's opinion, it is not material. Respondent here seeks a finding that the regulation as written and as applied to him is unlawfully vague. That is far different from it being too "restrictive" in certain applications. It should be axiomatic that a proposal to change a regulation (or even an agency notice of

We are aware of two instances, in addition to this case, where the FAA cited violations of this section due to right hand turns into Kotzebue. Thus, it would not be surprising for the industry to seek discussion of the matter with the FAA and amendment of the rule.

In his brief, respondent also challenges the law judge's failure to address respondent's argument that the restrictiveness of the rule produces unsafe conditions at this airport. That issue, however, is not one for the NTSB but for respondent to address to the FAA, as has been done. Our role does not extend to review of the adequacy or efficacy of the Federal Aviation Regulations.

proposed rulemaking to do so) offers no proof that the regulation, as currently written, is vague or otherwise unlawful -- respondent's relevant contention here.

Respondent's request for oral argument is also denied. The Board's rules provide for oral argument only when the need therefore appears (49 C.F.R. 821.48(g)). Because the request for oral argument relates solely to the new evidence we have declined to reopen the record to receive, the need for oral argument has not been shown. We turn now to the substance of the appeal.

Respondent's brief in support of reversal of the initial decision alleges that:

- The initial decision is not supported by a preponderance of reliable, probative, and substantial evidence;
- 2. The law judge misconstrued and misinterpreted FAR Section 91.89, and, in the process, ignored critical, probative material; and
- 3. Respondent's license suspension is unconstitutional, constituting a taking of property without due process of law.

The Administrator has filed a brief in reply, asserting that the initial decision is supported by the evidence of record, that the law judge properly interpreted FAR Section

And, even were the memo to conclude that the existing regulation is vague, and recommend a more specific one based on that conclusion, it would not compel reversal of the initial decision. Assuming the memo actually represents the writer's belief, the opinion of this employee does not dissuade us from our position on this question, as addressed in detail later in this decision. In addition, given the many types of aircraft, it could be quite difficult to craft a rule addressing this subject as specifically as respondent might desire.

91.89, and that respondent's rights were not violated, as he alleges, by a lack of certainty as to the precise meaning of the prohibition in the regulation. The Administrator urges that the Board affirm the initial decision.

Upon consideration of the briefs, the testimony and the entire record, the Board determines that safety in air commerce or air transportation and the public interest require that the Administrator's order be affirmed.

The parties agree that, in preparation for landing, respondent did not make all turns to the left as set forth in § 91.89(a)(1). Instead, the aircraft set up to the runway by making a turn to the right. The dispute here centers on one question: whether respondent's approach included a prohibited right turn, or whether it should have been considered a "straight-in" approach not prohibited by § 91.89(a)(1). The answer to that question depends on the distance from the airport when the right turn was made. The Board finds that the evidence of record supports the law judge's order,

<sup>&</sup>lt;sup>5</sup>FAR § 91.89(a)(l) is intended to assist in safe landings at uncontrolled airports. If aircraft are turning into final approach from different directions, they may not see (or be able to see) each other. This is especially true with larger aircraft. Thus, if turns are to be made, they are made in a uniform pattern. Alternatively, aircraft may land on a "straight-in" approach.

It is also relevant in this case to keep in mind that turning into an approach requires a certain amount of time, varying with the aircraft type, to stabilize the aircraft in preparation for landing. See infra.

although we do not adopt all of his findings.6

The law judge found that respondent turned for his landing approach between 1 and 2 miles before the runway.

Tr. at p. 183. Based on this, he found the violation had been proven because respondent's right turn to final on Runway 8 at Kotzebue was close enough to the airport as to be considered "a turn approaching to land" under § 91.89(a)(1).

Respondent challenges the factual distance finding, claiming that it is more than a credibility issue.

Respondent argues that he produced "objective" evidence that proves the law judge was mistaken in relying on the distance testimony of the FAA witnesses, rather than on respondent's technical analysis (which allegedly proves that the aircraft was considerably farther from the airport, approximately 4 miles rather than 1 or 2, when the right hand turn was made).

Despite respondent's characterization of the issue, this finding of fact was based on a credibility assessment. The resolution of a credibility determination is within the exclusive province of the trier of fact, and a law judge's credibility choices "are not vulnerable to reversal on appeal simply because respondent believes that more probable explanations . ..were put forth...". Administrator v. Klock, NTSB Order EA-3045 (1989) (slip opinion at 4). There is no

<sup>&</sup>lt;sup>6</sup>For example, the law judge determined that a turn in anticipation of a straight-in approach, made at 5 or 6 miles out, would not be considered a violation. We need not address that question, as it goes beyond the facts in this case.

doubt that the law judge considered all the evidence. That he rejected respondent's analysis makes this no less a credibility question. Accordingly, this argument offers no basis to reverse the initial decision.

We also find no merit in respondent's second allegation of error: that the law judge erroneously interpreted the cited regulation, section 91.89(a)(1). This claim is based on the argument that the right turn was made far enough from the runway that the landing was a permissible straight-in approach. Respondent avers that the regulation itself, by requiring that turns "while approaching to land" must be made to the left, but by failing to define "while approaching to land," does not resolve the question. He refers to other materials (the Airman's Information Manual (AIM) and FAA Advisory Circular 90-66) that in his view support his position. He concludes that the law judge's decision is an

The Board has also reviewed the evidence of record, including a transcript of communications with the local Flight Service Station and the testimony of the Administrator's eyewitnesses, the respondent and his copilot. We have also reviewed the testimony and exhibits provided by respondent's expert. We find this evidence provides no reason to question the law judge's credibility choice. The transcript of communications includes a record of respondent stating "Alaska 51 on a four mile right base. .." (Exh. A-2). Although respondent testified that the communication was only made to notify that the flight was in the area, in our view it is further evidence in support of the conclusion that the respondent's aircraft approached the airport on a right base leg.

<sup>&</sup>lt;sup>8</sup>Even were we to find that respondent made the turn for landing approach 4 miles before the runway, as alleged, this fact would be unavailing in light of our decision in Administrator v. Rivard, NTSB Order EA-3413 (1991), recon. den'd, EA-3484 (1992), discussed infra.

impermissible changed interpretation of the rule.9

Our decision in <u>Rivard</u><sup>10</sup> is dispositive of much of this claim. In that case, we considered nearly this exact situation -- an alleged violation of § 91.89(a) by another Alaska Airlines Flight #51 for its right turn prior to landing at Kotzebue. We held (EA-3413 at pps. 5-6) that, where (as there) a turn of at least 90 degrees did not commence until the aircraft had entered the "30 degree cone" approximately 6 nautical miles from the runway threshold:

We do not believe that it would be reasonable to find such an approach, in an aircraft as large as a Boeing 737, to be a straight-in approach. Footnote omitted.

That result applies here. The turn made was approximately 90 degrees and the aircraft entered the cone considerably fewer than 6 nautical miles from the runway.

In <u>Rivard</u>, we also stated (and it is equally relevant

<sup>&</sup>quot;We note that prior to <u>Rivard</u>, we had addressed § 91.89(a) in <u>Administrator v. Dibble</u>, 5 NTSB 352 (1985). The law judge's action was not a "changed interpretation"; his ultimate decision was entirely consistent with <u>Dibble</u>. Respondent is, however, correct to the extent that any interpretation of the regulation should take into account relevant advisory materials and manuals. Our analysis in <u>Rivard</u> and here does so.

<sup>&</sup>lt;sup>10</sup>See note 7, supra.

<sup>&</sup>quot;The AIM indicates that approaches within 30 degrees of the runway centerline are considered to be straight-in approaches. See Airman's Information Manual, January 11, 1990 Ed., ¶ 381d; November 14, 1991 Ed., ¶ 5-56d. The phrase "30 degree cone" refers to that approach space extending in a cone from a point at the centerline of the beginning of the runway. Respondent's claim that AIM's glossary definition of straight-in approaches countenances his action strains the meaning of that provision, ignores the above section, and produces an unreasonable result inconsistent with aviation safety.

### here):

[W]e do not think that there can be any doubt that a right turn was made while respondent was "approaching to land" in this case. Thus, assuming arguendo that section 91.89(a) admits of some degree of ambiguity in the abstract, it clearly proscribes the conduct at issue here and is, therefore, not unduly vague as it applies to respondent under the facts before us.

# <u>Id.</u> at p. 7.

Respondent raises an additional interpretive argument, which we also do not find persuasive. The allegation that FAA Advisory Circular (AC) 90-66 somehow justifies his action is not supported by the words of that document, when read in Paragraph 6c, cited by respondent to support his context. action, directs large aircraft to use a pattern that provides the greatest safety margin. This provision, however, is contained in a section addressing traffic pattern altitude. Moreover, as a generalized statement it would not supplant other, more specific, directives, including paragraph 4A of the same AC, which specifically notes that landings at uncontrolled airports be made with all turns to the left. The extended discussion of straight-in traffic reasonably leads to the conclusion that approach distances for such traffic are expected to be significant (so as to accommodate the safe operations of all incoming traffic) .12

<sup>&</sup>quot;We also reject respondent's claim that section 6d's reference to a final approach leg of "at least 1/4 mile" somehow preempts all the AC's other safety discussion. In any case, this phrase cannot be read to supersede practical requirements. Respondent concedes that it would be careless and reckless for a 737 to turn onto final approach 1/4 or 1/2 mile from the runway. Appeal at p. 29.

Respondent's final argument is that applying such a vague regulation to deny him use of his certificate would unconstitutionally deprive him of property without due process of law. Even were the regulation vague (and we have held in this context that it is not), this is not the forum for constitutional claims. The Board lacks the authority to rule on the constitutional validity of regulations promulgated by the Administrator. Administrator v. Lloyd, 1 NTSB 1826, 1828 (1972); Rivard, supra at pps. 6-7.

### ACCORDINGLY , IT IS ORDERED THAT:

- 1. Respondent's appeal is denied;
- 2. The Administrator's order and the initial decision are affirmed; and
- 3. The 25-day suspension of respondent's airline transport pilot (ATP) certificate shall begin 30 days after service of this order. 13

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT , Members of the Board, concurred in the above opinion and order.

<sup>&</sup>lt;sup>13</sup>For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR Section 61.19(f).